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No.

In the Supreme Court of the United States

October Term, 1984

MICHAEL DRAPE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

ROBERT G. DUNCAN - 17044
(*Counsel of Record*)
2800-B Kendallwood Pkwy.
Gladstone, Missouri 64119

MARY ANN DRAPE
Attorney at Law
1001 Bank of Kansas City Bldg.
Kansas City, Missouri 64105
Attorneys for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

35 pp

QUESTIONS PRESENTED

1. May a perjury conviction be based on literally truthful answers, no matter if the answers are unresponsive and arguably false by "negative implication"?
2. May a perjury conviction be based on a vague indictment which does not conform to Sixth Amendment?
3. Was there sufficient and substantial evidence to support the conviction?

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No.

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MICHAEL DRAPE,
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vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Michael J. Drape, Petitioner, Petitions for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in the case filed on January 24, 1985, and entered on February 20, 1985.

OPINION

The opinion of the Court of Appeals, Appendix B.

The opinion of the District Court is not reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 24, 1985. On February 20, 1985, the Petitioner's Petition for Rehearing was denied. On March

5, 1985, Petitioner's Motion for Stay of Mandate was denied. On March 17, 1985, Mr. Justice Blackmun extended the time for filing a petition for Writ of Certiorari, to and including, May 20, 1985.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATUTE INVOLVED

18 U.S.C. 1623 is set forth at Appendix C.

STATEMENT

Petitioner Michael J. Drape, a practicing attorney before the Missouri Bar, was found guilty on a single count of perjury before a Grand Jury. The Grand Jury was investigating the alleged non-filing of Federal Income Tax Returns and alleged evasion of Federal Income taxes by Petitioner's client, James Duardi.

The Petitioner was subpoenaed on July 9, 1982, by IRS Agent Michael Wamser, who requested that Petitioner produce retained copies of 1978 and 1979 Federal Income Tax Returns of James Duardi. Petitioner produced the copies which were then initialed by Agent Wamser, and Petitioner was instructed to take them to his appearance before the Grand Jury on July 14, 1982.

Pursuant to that subpoena, Petitioner appeared and presented the initialed copies to the Grand Jury. He was questioned regarding them and the copies were kept by the Grand Jury.

Subsequently, Petitioner was indicted by the Grand Jury under 18 U.S.C. 1623 for making a false declaration before the Grand Jury when he testified regarding the

copies of the 1978 and 1979 Federal Income Tax Returns that he delivered to the Grand Jury. At Petitioner's trial, the copies were admitted in evidence as Exhibit 4 (a) through (h).

The alleged false testimony, as set out in the Indictment, takes up several pages. For brevity's sake, the Indictment is attached as Appendix A. For ease of reference, the questions in the Indictment are numbered.

Referring to Paragraph 3 of the Indictment, it is alleged that Petitioner's testimony was false in that:

> ". . . he then well knew and believed that the copies of James Duardi's 1978 and 1979 Federal Income Tax returns that he had provided to an agent of the Internal Revenue Service and then brought to the Grand Jury were not copies made at the time the 1978 and 1979 returns were alleged to have been prepared and filed, but rather, were copies made during the period from on or about December 7, 1981, until on or about February 27, 1982."

It is important to note for the record that there were three sets of copies of 1978 and 1979 returns that were entered as evidence into Petitioner's trial. The Petitioner himself provided the three sets of copies during the investigation of Duardi's alleged non-filing of Federal Income Tax Returns and alleged evasion of Federal Income taxes. As previously stated, Exhibit 4 (a) through (h) were the copies of 1978 and 1979 returns that Petitioner gave to Agent Wamser who initialed and returned them on July 9, 1982. These were the copies which Petitioner brought to the Grand Jury and upon which he was examined. Exhibit 1 (a) through (h) and Exhibit 2 (a) through (h) were copies of returns that Petitioner voluntarily gave to Agent Wamser prior to Petitioner's ap-

pearance before the Grand Jury. These copies were not before the Grand Jury.

Exhibits 1 (a) through (h), 2 (a) through (h) and 4 (a) through (h) were further distinguished by testimony of Agent Wamser and James M. Davidson, an Internal Revenue Service Questioned Documents Examiner, at Petitioner's trial.

Referring to Exhibit 4 (a) through (h), the copies of returns that were initialed by Mr. Wamser and produced by Petitioner before the Grand Jury, Mr. Wamser testified in response to a question by the prosecution (Transcript Vol. 1, pp. 69-70):

"Q. What, if anything else, did the defendant state concerning the '78 and '79 returns sir, concerning the original documents themselves, retained copies.

A. I asked him if the copies that he was providing me were the first retained copies, which he stated that he believed they were, and if they weren't they were the copies that I had provided him in April of 1982."

Additional testimony was presented by James M. Davidson describing Exhibit 4 (a) through (h) in response to the prosecution (Transcript Vol. 1, pp. 153-154):

"Q. Finally, one last area. Government Exhibit No. 4 in the brown envelope, Sir, containing what has been admitted as documents, 1978-'79 copies of Federal Tax returns submitted to a Grand Jury, were you asked to determine whether those were made on the same machine that Governments Exhibits 1 and 2 were made on, sir?

A. Yes, I was.

Q. Were you able to form an opinion in that matter, sir?

A. Yes, I was.

Q. What was that opinion?

A. It was my opinion that Government's Exhibit 4 (a) through (h) are machine copies. However, they are not copies that were made on the same machine that produced Governments Exhibit 1 (a) through (h) or 2 (a) through (h)."

Though Mr. Davidson does not testify when Exhibit 4 (a) through (h) were made, he does state that Exhibits 1 and 2 were made some- ". . . sometime between the dates of 11-30-81 and 2-27-82." (Transcript Vol. 1, p. 147).

Petitioner includes the trial testimony of Agent Wamser and Mr. Davidson here to set out the undisputed facts relevant to his contention that his perjury conviction has been unjustly affirmed.

Finally, Petitioner offers a statement made by the District Court Judge Elmo B. Hunter, which he addressed to the Defendant at the trial's outcome (Transcript Vol. 2, p. 76):

> "It is just one of those situations where you have two versions, the evidence will support either version, and the jury decided to accept the Government's version as the one that had integrity which they should follow. That is what it amounts to."

Petitioner respectfully submits that presuming the evidence was evenly balanced, the verdict should have been set aside.

REASONS FOR GRANTING THE WRIT

I. The Circuit Court Erred in Affirming Petitioner's Conviction When It Failed to Recognize the Literal Truthfulness of Petitioner's Answers.

By a unanimous decision, The Court of Appeals for the Eighth Circuit affirmed petitioner's judgment of conviction in the United States District Court for the Western District of Missouri, Western Division, entered on a one count indictment of perjury in violation of 18 U.S.C. 1623.

The basic issue raised here, upon which the Circuit Court erred, involves a fundamental construction of the Federal Perjury statute:

Can a witness be convicted of perjury for an answer, under oath, that is literally true but not responsive to the question asked and arguably misleading by negative implication?

On this point the Supreme Court has ruled unequivocally no. *Bronston v. United States,* 409 U.S. 352, 93 S. Ct. 595, 34 L.Ed.2d 568 (1973).

Chief Justice Burger wrote in the opinion:

> ". . . the perjury statute is not to be loosely construed, nor the statute invoked simply because a wily witness succeeds in derailing the questioner—so long as the witness speaks the literal truth." (*Bronston, supra,* p. 360).

In affirming the conviction, the Circuit Court has ignored whether the literal truth was spoken by the Petitioner in answer to questions asking when the 1978 and 1979 Federal Tax returns were copied.

Close scrutiny of the eleven questions in the Indictment regarding the copies of the 1978 and 1979 returns that Petitioner testified about before the Grand Jury reveals that the Petitioner met the requirement of *Bronston*: He spoke the literal truth in reply to the questioner.

In *Bronston*, the alleged false statement was set forth in a relatively brief exchange:

"Q: Do you have any bank accounts in Swiss Banks, Mr. Bronston?

A: No, sir.

Q: Have you ever?

A: The company had an account there for about six months, in Zurich.

Q: Have you any nominees who have bank accounts in Swiss banks?

A: No, sir.

The prosecution contended that when Bronston answered the second question by speaking of his company, he gave a literally truthful answer—and he implied that he had no personal Swiss bank accounts. *Bronston, supra,* p. 355.

Since he had a personal Swiss bank account at one time, the prosecution submitted that the statement was false. The Supreme Court held that a literally true answer no matter how unresponsive or misleading by negative implication is not sufficient to sustain a conviction of perjury. *Bronston, supra,* p. 360.

Beginning with question 10 in the Indictment (Appendix A), Petitioner is asked if the copy of the 1978 return that he provided the Grand Jury is the only copy. The copy of the 1978 return is the subject of each question

up to and including question 19. At question 20, the copy of the 1979 return is introduced for the first and only time.

In following the series of questions in context, Petitioner submits that question 14 elicited an unequivocal, literally truthful answer:

> 14. "Q: That's your claim that this xerox then was made in the early part of '79 when the return was forwarded?
>
> A: It's my claim that I made a xerox—"

It is clear from the transcript that at this point the Petitioner was interrupted by the questioner. Nonetheless, before proceeding with the direction the questioning takes after question 14, Petitioner points out that questions 10 through 13 are preliminaries leading up to the two elements stated in question 14: 1) that the copy was made at a particular time ("the early part of '79") and 2) the copy was made from the original ("when the return was forwarded").

Faced with a precise and unambiguous question, the Petitioner reacted with specificity—and caution.

In questions 15 through 17, the possibility is introduced that the copy of the 1978 tax return is other than the first retained copy from the original of the 1978 tax return. Petitioner himself states in Answer to question 16:

> "A: And he (Wamser) gave it back to me and he either gave me the one back that I gave him or he made a copy and gave it back to me."

Obviously, Petitioner is interested in stating the precise nature of the copy in question. He recognized that the copy of the 1978 return may indeed be a first retained copy or a copy made at some other time.

It is only when the questioner prefaced question 18 "So assuming" that Petitioner resumed answering affirmatively that the copy of the 1978 tax return that he provided the Grand Jury is a first retained copy.

Significantly, the hypothetical phrasing of the questions extended through question 20, where the Petitioner stated on the single occasion in the Indictment that the copy of the 1979 return is a first retained copy.

Question 20 further signaled the confusion of the questioner herself at the end of the series of questions framed to elicit exactly when the copies of the 1978 and 1979 tax returns were made. Questioner extended the hypothetical question to include the 1980 return. The 1980 return however was not relevant to the Indictment. Moreover, question 4 of the indictment reads:

"Q: The '80, (tax return), you may have missed sending the '80 in

A: Yes, that may have been an error on my part."

In the instant case, it is crucial to read the relevant portions of the Indictment—the eleven questions and answers regarding when the copies of the 1978 and 1979 returns were made—to test the falsehood alleged in paragraph 3 of the Indictment:

> ". . . he then well knew and believed that the copies of James Duardi's 1978 and 1979 Federal Income Tax Returns that he had provided to an agent of the Internal Revenue Service and then brought to the Grand Jury were not copies made at the time the 1978 and 1979 returns were alleged to have been prepared and filed, but rather, were copies made during the period from on or about December 7, 1981, until on or about February 27, 1982." (Appendix A).

Whether Petitioner is judged to be precise, specific or cautious in stating his answers in the testimony contained in the Indictment, or whether he is judged to be evasive—the issue remains whether he spoke the literal truth. In Petitioner's case, as in *Bronston v. United States,* 409 U.S. 352, 93 S.Ct. 595, 34 L.Ed.2d 568 (1973), ". . . any special problems arising from the literally true but unresponsive answer are to be remedied through the 'questioner's acuity' and not by a federal perjury prosecution." (p. 362).

See also: *United States v. Laikin,* 583 F.2d 75 (7th Circuit 1978); *United States v. Vesaas,* 586 F.2d 101 (8th Circuit 1978).

II. The Questioning Was Too Non-Specific and Too Vague to Form a Fair Charge, Thereby Violating the Petitioner's Sixth Amendment Right to Know the Nature of the Accusation Against Him.

By the Sixth Amendment, Petitioner is guaranteed the right ". . . to be informed of the nature and cause of the accusation . . ." against him. To safeguard this right, the Indictment need be ". . . a plain, concise and definite statement of the essential facts constituting the offense charged." (Federal Rules of Criminal Procedure, Rule 7 (c) (1)).

Petitioner raised in pre-trial and post-trial motions the issue of non-specificity, vagueness and ambiguity of the questions contained in the Indictment. Specific questions are necessary so that the matter of when the copies were made can be clearly stated. If the lawyer examining Petitioner before the Grand Jury wanted to know if the copies were made, as stated in the Indictment (Appendix A) ". . . on or about December 7, 1981, until on or about February 27, 1982.", she should have said so. She did not. It is unfair to charge a witness with perjury under such

circumstances. The conviction should not be permitted to stand.

In affirming the Petitioner's conviction, the Circuit Court quoted the District Court's order denying the motion to dismiss the indictment:

> "After careful examination of the record, however, we agree with the District Court that although 'not perfectly phrased, (the grand jury questions) are clear and precise to form the basis for the perjury charge.'" (Opinion of the Eighth Circuit Court, Appendix B.

In light of the interpretation of the Federal perjury statute in *Bronston v. United States,* 409 U.S. 352, 93 S.Ct. 595, 23 L.Ed.2d 568 (1973), the Circuit Court failed to abide by the Supreme Court's teaching that "Precise questioning is imperative as a predicate for the offense of perjury." (p. 362).

Plainly the burden in a perjury prosecution is on the questioner to ask specific questions and obtain specific answers.

See also *United States of America v. Victor Crowley and Michael St. Clair,* 720 F.2d 1037 (9th Circuit 1983); *United States v. Slawick,* 548 F.2d 75 (3rd Circuit 1977); *United States v. James R. Tonelli,* 577 F.2d 194 (3rd Circuit 1978).

III. Petitioner's Right to Due Process Was Violated Because There Was No Evidence That the Copies of the 1978 and 1979 Federal Income Tax Returns Produced by Petitioner Before the Grand Jury Were Made Between December 7, 1981, and February 27, 1982, Which Was the Falsity Alleged in the Indictment.

The government put into evidence three sets of copies of 1978 and 1979 Federal Income Tax Returns: Exhibits 1, 2 and 4.

Exhibits 1 (a) through (h) and 2 (a) through (h) were copies of 1978 and 1979 returns that Petitioner had voluntarily given to IRS Agent Michael Wamser on separate occasions during the months prior to Petitioner's appearance before the Grand Jury.

Exhibit 4 (a) through (h) were copies of the 1978 and 1979 returns that Petitioner brought to the Grand Jury and upon which he was examined.

The government offered the expert testimony of James M. Davidson, an IRS Questioned Documents Examiner, that Exhibits 1 and 2 were copies made sometime "between the dates 11-30-81 and 2-27-82." (Transcript Vol. 1, p. 147, quoted in Statement).

This evidence however has nothing to do with the matter charged in the Indictment. The Indictment charged that the copies of 1978 and 1979 returns that Petitioner provided to IRS Agent Wamser and brought to the Grand Jury—Exhibit 4—were made ". . . during the period from on or about December 7, 1981, until on or about February 27, 1982." (Appendix A, paragraph 3 of the Indictment).

The variance between the date Mr. Davidson testified to, that is, "11-30-81", and the date specified in the In-

dictment, "December 7, 1981", is an irregularity for which the government offers no explanation.

Decidely more acute is the government's failure to explain when Exhibit 4, the copies that Petitioner was questioned about before the Grand Jury, were made.

Mr. Davidson offers no dates, whether within days, weeks or months, when the copies that constitute Exhibit 4 were made.

The trial record shows only that Mr. Davidson testified that Exhibit 4 was not ". . . made on the same machine that produced Exhibit 1 (a) through (h) and Exhibit 2 (a) through (h)." (Transcript Vol. 1, pp. 153-54, quoted in the Statement).

In the language of the Indictment (Appendix A, paragraph 3), Exhibit 4 is described as the copies that Petitioner ". . . provided to an IRS Agent and then brought to the Grand Jury. . .". Though reasonable to assume that Exhibit 4 is one set of copies that were provided *first* to an IRS agent and then brought to the Grand Jury, the description also admits the possibility that two copies are referred to: One provided to the IRS Agent and another to the Grand Jury.

Common sense says that if Exhibit 4 were a copy of Exhibit 1 or 2, then the distinctive markings that enabled Mr. Davidson to state when the latter copies were made would appear on Exhibit 4. Mr. Davidson is silent on the matter.

A conviction upon a charge not alleged in the Indictment violates the Petitioner's right to due process under law as guaranteed by the Fifth Amendment. *DeJorge v. Oregon*, 299 U.S. 353, 57 S.Ct. 256 (1937). Similarly, a conviction devoid of evidence violates due process. *Thompson v. City of Louisville*, 362 U.S. 199, 80 S.Ct. 624 (1960).

If the conviction of the Petitioner is to stand there must have been evidence beyond a reasonable doubt that the Grand Jury testimony was false in the manner alleged. Failure to specify when Exhibit 4 was copied, especially as relevant to the dates on the testimony of Mr. Davidson and the dates specified in paragraph 3 of the Indictment, suggests that there is no evidence at all contrary to the charge. Failure to link Exhibit 4 with Exhibits 1 and 2 fails the test of common sense. Finally, the description of Exhibit 4 as set forth in the Indictment admits the possibility of several interpretations as to when and where the copies were made.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated Kansas City, Missouri, May 20, 1985.

Respectfully submitted,

ROBERT G. DUNCAN - 17044
(Counsel of Record)
2800-B Kendallwood Pkwy.
Gladstone, Missouri 64119

MARY ANN DRAPE
Attorney at Law
1001 Bank of Kansas City Bldg.
Kansas City, Missouri 64105
Attorneys for Petitioner

APPENDIX

APPENDIX A

(Filed December 1, 1983)

IN THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 83-00164-01-CR-W-8
18 U.S.C. § 1623
(NMT 5 years and/or $10,000)

UNITED STATES OF AMERICA,
Plaintiff,

v.

MICHAEL DRAPE, [DOB: 08/16/21]
Defendant.

INDICTMENT

THE GRAND JURY CHARGES THAT:

1. On or about July 14, 1982, there was pending befor a Special Grand Jury of the United States in the Western District of Missouri, Western Division, a proceeding, that is, an investigation of possible violations of Federal law relating to the non-filing of Federal income tax returns and evasion of Federal income taxes by James Duardi.

2. On or about July 14, 1982, in Kansas City, in the Western District of Missouri, the defendant MICHAEL DRAPE, while under oath as a witness in said proceedings,

did willfully and knowingly make a false material declaration to the Grand Jury in that in response to questions by Government counsel he testified as follows:

1. Q: It is generally our practice to advise witnesses appearing before the grand jury of their rights. Like all witnesses, you have the right to refuse to answer a question based on the Fifth Amendment to the U.S. Constitution, if you legitimately feel your answer will incriminate you. Anything you say could conceivably be used against you by the grand jury or in subsequent legal proceedings. Should you desire, you may also consult with an attorney of your choice outside the grand jury room; however, he is not permitted in this room.

   Your testimony before the grand jury is secret and may not be disclosed by the government or the grand jury to other persons except in accordance with law or pursuant to a court order. The grand jury requests that you not disclose your testimony with others, except with your attorney, if you so desire.

   Finally, I must remind you that your testimony is under oath and will be recorded. If you were to give any willful false testimony as to any material fact, you would be subject to prosecution for perjury or false declaration, which are felonies punishable by fine or imprisonment.

   Do you understand those rights?

   A: I do.

2. Q: You are an attorney, are you not?

   A: Yes. . .

* * *

3. Q: Now, you're appearing here as a result of a subpoena that was directed to you by the grand jury that also commanded you not only to testify but to bring with you all taxpayer-retained copies of the 1978, '79 and '80 Forms 1040 for taxpayer James S. Duardi.

   A: I have them.

• • •

4. Q: The '80, you may have missed sending the '80 in?

   A: Yes, that may have been an error on my part.

5. Q: But you are sure you sent the '78 and '79 in?

   A: No.

6. Q: You, yourself?

   A: What I'm sure of is that they were prepared at my office.

7. Q: And were given to Mr. Duardi to send in?

   A: Mr. Duardi signed them, we typed, us, and one of us.

8. Q: One of us, who?

   A: Either my secretary or myself sent them in. I don't take every piece of mail to the Post Office.

9. Q: You didn't give them to Mr. Duardi to send in?

   A: No, ma'am.

10. Q: Let's talk about the '78 return now. Am I to understand that you have no copies of the 1978 return with the exception of what you just gave us? There is no other duplicate original or anything else of the 1978 return that is at your office at home or in anyone else's possession?

    A: Not that I'm aware of.

11. Q: Again, is it your recollection that this copy that you have handed us, this xerox, was made from the copy that was sent to IRS?

A: Yes.

12. Q: Then this would be the original or first xeroxed copy of the original, is that correct?

A: (Witness nods head.)

13. Q: So it would have been made then in the early part of 1979 or whenever?

A: Yes.

14. Q: That's your claim that this xerox then was made in the early part of '79 when the return was forwarded?

A: It's my claim that I made a xerox—

15. Q: Is this a xerox?

A: Mr. Wamser could have made a xerox of the xerox that I made but that's the only copy I have.

16. Q: So, either you had already given it to Mr. Wamser—

A: And he gave it back to me and he either gave me the one back that I gave him or he made a copy and gave it back to me.

17. Q: When Mr. Wamser asked for these copies the first time, you didn't make copies, you just gave him what you had in the file, is that correct?

A: Yes.

18. Q: So assuming that Mr. Wamser doesn't have the original or that Mr. Wamser gave you back what

you gave him, then this is a copy that was made when you sent it in?

A: Yes.

19. Q: Off the original and when you prepared it and sent it in in January of '79?

A: Yes.

20. Q: And likewise on the '79 return, if this is a copy of what Mr. Wamser returned to you, then this is a copy that would have been made in January or the early part of 1980 when this return was sent in and, likewise, the '80 return would have been prepared and sent in the early part of 1981 and this is a copy of that document?

A: Yes.

* * *

21. Q: Let's talk about the 1978 return. When was the information typed on this return?

A: Probably in '79.

22. Q: Could it have been as late as 1982?

A: No.

23. Q: You're testifying unequivocally it was not typed in '82?

A: I'm testifying that the man probably came to me in '79 and that's when it was done. That's my best recollection, I can't tell you if it was typed in '82. My best recollection is I did it—

24. Q: You can't tell me if it was typed in 1982?

A: I can tell you that it wasn't typed in '82, because why would they have been there to then, I'm saying to you that the man usually comes in after—

25. Q: I'm asking you if these were typed in '79 when they should have been sent in or if they were typed in 1981 or 1982 when IRS asked to see them?

A: My recollection is they were typed the year that they were supposed to be done. Nobody typed any in '82 or anything that I know of.

26. Q: You're saying then that the '78 return would have been typed in '79, immediately following 1978?

A: Uh-huh.

27. Q: When was the 1979 return typed?

A: Probably in '80.

28. Q: Probably?

A: Uh-huh.

29. Q: Was it typed as late as 1982?

A: I don't think so. I'm sure it wasn't. I don't know what you are asking me.

30. Q: If it was typed in '82, it would have been done so with your knowledge, would it not have?

A: Yes, and I have no knowledge.

3. It was a matter material to said Special Grand Jury's investigation of James Duardi for possible failure to file Federal income tax returns and evasion of Federal income taxes whether defendant MICHAEL DRAPE did timely prepare, file or retain copies of James Duardi's returns that were represented to have been timely filed by defendant for the taxable years of 1978 and 1979. And such testimony by defendant was false and contrary to the oath taken by defendant MICHAEL DRAPE as he then well

knew and believed that the copies of James Duardi's 1978 and 1979 Federal Income Tax Returns that he had provided to an agent of the Internal Revenue Service and then brought to the Grand Jury were not copies made at the time the 1978 and 1979 returns were alleged to have been prepared and filed, but rather, were copies made during the period from on or about December 7, 1981, until on or about February 27, 1982.

All in violation of Title 18, United States Code, Section 1623.

A TRUE BILL.
/s/ (Illegible)

Foreman of the Grand Jury

Dec. 1, 1983
Date

/s/ Thomas M. Larson
for Robert G. Ulrich
United States Attorney
Western District of Missouri

/s/ Richard J. Marien
Richard J. Marien
Attorney
U.S. Department of Justice

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 84-1560

United States of America,
Appellee,

v.

Michael Drape,
Appellant.

Appeal from the United States District Court for the Western District of Missouri

Submitted: January 14, 1985
Filed: January 24, 1985

Before HEANEY, McMILLIAN and ARNOLD, Circuit Judges.

PER CURIAM.

Michael Drape appeals from a final judgment entered in the District Court[1] for the Western District of Missouri upon a jury verdict finding him guilty of making false declarations before a special federal grand jury in violation of 18 U.S.C. § 1623. The district court sentenced appellant to one year imprisonment, with that portion in ex-

1. The Honorable Elmo B. Hunter, United States Senior District Judge for the Western District of Missouri.

cess of five months suspended, and three years probation upon his release from confinement, and fined appellant $1,000. For reversal appellant argues that the district court erred in (1) failing to properly instruct the jury, (2) failing to dismiss the indictment because the questions by the grand jury were vague and because the indictment failed to sufficiently state the offense, and (3) failing to grant appellant's motion for judgment of acquittal because the alleged perjurious statements were not material and because the evidence was insufficient to support the jury verdict. For the reasons discussed below, we affirm the judgment of the district court.

Keeping in mind that the evidence must be construed in the light most favorable to the jury verdict, *Hamling v. United States*, 418 U.S. 87 (1974), the facts can be summarized as follows. On December 1, 1981, agent Michael Wamser of the Internal Revenue Service (IRS) visited James Duardi at his home to inform him that he was being investigated for possible federal income tax evasion and failure to file federal income tax returns for the years 1978, 1979, and 1980. Duardi told Wamser that those returns had been prepared and filed by his attorney and bookkeeper, Michael Drape.

Wamser and another IRS agent went to appellant's law office later that same day. Wamser told appellant of the purpose of his visit. Appellant stated that Duardi's 1978, 1979 and 1980 federal income tax returns had been timely prepared and filed. When asked if he had copies of these returns, appellant responded affirmatively but stated that they were at his home where he kept Duardi's file. Appellant also informed Wamser that he prepared Duardi's returns for several years without charge because Duardi had sent appellant many clients in the beginning of appellant's legal career.

Appellant agreed that he would secure power of attorney from Duardi in order to be able to fully discuss Duardi's tax matters with Wamser. On December 18, 1981, Wamser received an envelope from appellant containing an executed power of attorney form and one copy of each of three federal tax returns for 1978, 1979 and 1980.

On March 15, 1982, Wamser received another set of copies of Duardi's federal tax returns for the years 1978, 1979 and 1980. This set was identical to the first returns received by Wamser except that the second set was labelled "March set" and had social security numbers typed into the appropriate boxes on the returns.

On April 9, 1982, appellant telephoned Wamser to ask if appellant could have the copies of Duardi's 1978 and 1979 returns that he had mailed to Wamser, apparently having misplaced his own copies. Wamser copied on his office copy machine the "March set" of the 1978 and 1979 returns and sent to appellant the copies that agent Wamser made at his office.

On July 14, 1982, appellant appeared before a federal grand jury and testified that he believed that the 1978 and 1979 returns were timely prepared and filed, even though he had failed to timely file Duardi's 1980 federal tax return. He also testified that he copied the 1978 and 1979 returns in 1979 and 1980, respectively, at the time he filed the returns in the proper year. Appellant testified that he had mailed to Wamser the 1979 and 1980 copies of the returns.

At appellant's trial on the perjury charge the government called James M. Davidson, a documents examiner. Davidson testified that appellant had made the photocopies of Duardi's returns on a copy machine at the public library across the street from appellant's law office. Ac-

cording to library records, the copies were made between November 30, 1981, and February 27, 1982. Davidson also testified that the copies provided to Wamser were reproductions of original federal income tax forms attached to Duardi's 1978 and 1979 Missouri income tax returns which were filed with the State of Missouri on December 18, 1981, and December 21, 1981.

Appellant admitted that his testimony before the grand jury was false but claimed that he did not intentionally testify falsely. He testified that he was not confused, but that he had forgotten what he had done concerning the tax returns. Appellant was convicted of willfully and knowingly making a false material declaration to the grand jury in response to the government's questions under oath as a witness.

Appellant argues that the district court improperly instructed the jury because the instructions failed to define with substantial particularity the statements alleged to be perjurious. The district court's instruction about the elements of the offense was taken from 2 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions § 33.10, at 98 (3d ed. 1977). A complete reading of the indictment by the district court to the jury immediately preceded this instruction.

The district court's charge to the jury must accurately reflect the applicable law. The district court has broad discretion in formulating the wording of its instruction. *United States v. Williams*, 604 F.2d 1102, 1120 (8th Cir. 1979). Considering the jury instructions in this case as a whole, we hold that the district court thoroughly instructed the jury about the law and the evidence in this case.

Next, appellant argues that the district court erred in failing to dismiss the indictment because the questions propounded by the grand jury were vague and subject to misunderstanding and lacked sufficient specificity.

We reject appellant's argument. "Precise questioning is imperative as a predicate for the offense of perjury." *Bronston v. United States,* 409 U.S. 352, 362 (1973). After careful examination of the record, however, we agree with the district court that although "not perfectly phrased, [the grand jury questions] are sufficiently clear and precise to form the basis for the perjury charge." *United States v. Drape,* No. 83-00164-01-CR-W-3, slip op. at 2 (W.D. Mo. Feb. 21, 1984) (order denying motions to dismiss indictment).

Appellant also argues that the district court erred in failing to dismiss the indictment for failure to state an offense. The district court considered this argument and stated:

> This is more than adequate to inform the defendant in which way his statements are alleged to be false. This need not include the evidentiary details of how the defendant knew that the statements were false.
>
> The indictment tracks the language of the appropriate statute, contains all of the essential elements of the offense charged, and informs the defendant of the charge against which he must defend, enabling him to plead an acquittal or conviction in bar of future prosecution for the same offense.

United States v. Drape, No. 83-00164-01-CR-W-3, slip op. at 6. The district court's conclusion is consistent with the cases of this circuit. *See United States v. Fultz,* 602 F.2d 830, 832 (8th Cir. 1979); *Tasby v. United States,* 504 F.2d 332, 335 (8th Cir. 1974), *cert. denied,* 419 U.S. 1125

(1975). We agree with the district court that the indictment sufficiently apprised appellant of the charges against him.

Appellant argues that the district court erred in failing to sustain his motion for judgment of acquittal because the alleged perjurious statements were not material to the grand jury investigation and because the indictment failed to demonstrate how the alleged falsity impeded the grand jury deliberations and investigations. The district court expressly found that appellant's false declarations were material and substantial to the grand jury's investigation.

In *United States v. Ostertag*, 671 F.2d 262, 264 (8th Cir. 1982) (citations omitted), we stated that "[t]he test of materiality is whether or not the statements alleged to be perjurious tend to impede or hamper the course of the investigation by the grand jury." We agree with the district court that appellant's false statements that he possessed copies of the original 1978 and 1979 federal tax returns made at the time the original returns were timely prepared and filed were material to the grand jury's investigation concerning failure to file federal tax returns and evasion of federal income taxes by James Duardi.

Finally, appellant argues that there was insufficient evidence to convict him and therefore the district court erred in denying his motion for acquittal. Evidence is sufficient to convict if, when viewed in the light most favorable to the jury verdict, there is substantial evidence to support it. *United States v. Center*, No. 84-1715, slip op. at 3 (8th Cir. Dec. 26, 1984) (per curiam), *citing Glasser v. United States*, 315 U.S. 60 (1942). The evidence presented by Davidson, the librarian, the IBM repair person and the IBM usage cards demonstrated that ap-

pellant made copies of the original 1978 and 1979 federal tax returns between November 30, 1981, and February 27, 1982, and not in 1979 and 1980 as appellant had testified before the grand jury. We hold, therefore, that there was sufficient evidence to support the jury verdict.

Accordingly, the judgment of the district court is affirmed.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

APPENDIX C

§ 1623. False declarations before grand jury or court

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code [28 USCS § 1746]) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if—

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

(Added Oct. 15, 1970, P. L. 91-452, Title IV, § 401(a), 84 Stat. 932; Oct. 18, 1976, P. L. 94-550, § 6, 90 Stat. 2535.)

(2)

No. 84-1833

Supreme Court, U.S.
FILED
JUL 26 1985
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

MICHAEL DRAPE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1833

MICHAEL DRAPE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the evidence was insufficient to support his conviction for perjury.

1. Following a jury trial in the United States District Court for the Western District of Missouri, petitioner was convicted of making false declarations before a grand jury, in violation of 18 U.S.C. 1623. He was sentenced to one year's imprisonment, all but five months of which was suspended, to be followed upon his release from confinement by three years' probation. He was also fined $1,000. The court of appeals affirmed (Pet. App. A8-A14).

a. The evidence, which is summarized in the opinion of the court of appeals (Pet. App. A9-A11), showed that on December 1, 1981, IRS Agent Michael Wamser informed James Duardi that he was being investigated for evading the federal income tax laws and for failing to file income tax returns for the years 1978, 1979, and 1980. Duardi told

Agent Wamser that those returns had been prepared and filed by petitioner, who was Duardi's attorney and bookkeeper (*id.* at A9). Later that day, Agent Wamser and another IRS agent met with petitioner at his law office. After being told the purpose of the agents' visit, petitioner stated that Duardi's 1978, 1979, and 1980 income tax returns had been timely prepared and filed, and he agreed to obtain copies of the returns for the agents. On December 18, Agent Wamser received one copy of each of Duardi's tax returns for 1978, 1979, and 1980 from petitioner (GX 1). Three months later, Agent Wamser received another set of Duardi's tax returns from petitioner. This set was identical to the first one except that the second set was labelled "March set" and had social security numbers typed into the appropriate boxes on the returns (Pet. App. A9-A10; GX 2).

On April 9, 1982, petitioner asked Agent Wamser if he could have the copies of Duardi's 1978 and 1979 returns that he had provided to the agent, because he had misplaced his own copies. Agent Wamser copied the "March set" of the returns and sent the copies that he had made to petitioner (Pet. App. A10; GX 4).

On July 14, 1982, petitioner testified before a federal grand jury that he believed that the 1978 and 1979 returns were prepared and filed on time, even though he acknowledged that he had failed to file Duardi's 1980 return on time. Petitioner also testified that he had copied the 1978 and 1979 returns in 1979 and 1980, respectively, at the time that he filed Duardi's returns, and he stated that he had mailed those copies to Agent Wamser (Pet. App. A10).*

At petitioner's trial on the perjury charge, James Davidson, a documents examiner, testified that petitioner had made the photocopies of Duardi's returns on a copy

---

*Petitioner's grand jury testimony is excerpted in pertinent part in the indictment (Pet. App. A2-A6).

machine at the public library across the street from petitioner's office (Pet. App. A10). According to library records, the copies were made between November 30, 1981, and February 27, 1982 (*id.* at A11). Davidson also testified that the copies that petitioner had provided to Agent Wamser were reproductions of original federal income tax forms attached to Duardi's 1978 and 1979 Missouri state tax returns, which were filed on December 18, 1981, and December 21, 1981, respectively (*ibid.*).

Petitioner admitted at trial that his testimony before the grand jury was false, and he added that he was not confused when he gave those false answers (Pet. App. A11). He claimed, however, that he did not intend to give false testimony, but simply forgot what he had done concerning the tax returns (*ibid.*).

b. The court of appeals affirmed in an unpublished opinion (Pet. App. A8-A14). The court held that the indictment and the grand jury's questions were sufficiently specific to form the basis for a perjury charge (*id.* at A12-A13). The court also held that the testimonial and documentary evidence adduced by the government was sufficient to sustain petitioner's conviction (*id.* at A13-A14).

2. Petitioner contends that the evidence was insufficient to support his perjury conviction in three respects. First, he claims (Pet. 6-10) that his answers to the questions were literally true, even if unresponsive. Second, he maintains (Pet. 10-11) that the questions propounded by the grand jury were insufficiently precise. And, finally, he argues (Pet. 12-14) that the government failed to prove that the copies of the 1978 and 1979 tax returns were in fact made between December 7, 1981, and February 27, 1982, as alleged in the indictment. However, both the district court and the court of appeals found that the evidence was sufficient to support petitioner's conviction. Given these concurrent findings by

the lower courts, review by this Court of petitioner's fact-bound claims is unwarranted. See, *e.g., United States* v. *Doe*, No. 82-786 (Feb. 28, 1984), slip op. 8. In any event, petitioner's contentions lack merit.

a. Petitioner claims that his grand jury testimony was literally true and was, at most, unresponsive to the questions asked. Petitioner did not assert this claim before the court of appeals, however, and he therefore may not raise it here. See, *e.g., United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In any event, petitioner's claim is insubstantial. In *Bronston* v. *United States*, 409 U.S. 352 (1973), the Court held that literally true but unresponsive answers may not serve as the basis of a perjury prosecution. But *Bronston* is not applicable to this case. In arguing that his answers were literally true, petitioner isolates one brief exchange from his grand jury testimony (Pet. App. A4):

> Q: That's your claim that this xerox then was made in the early part of '79 when the return was forwarded?
>
> A: It's my claim that I made a xerox—

However, petitioner later gave affirmative answers in response to the prosecutor's questions asking whether the copies that he had provided to Agent Wamser were made by him when the returns were allegedly filed in 1979 and 1980 (*id.* at A4-A5). The indictment alleged that these answers —which in no sense can be characterized as literally true —were false, not the answer upon which petitioner relies (see Pet. App. A6-A7 (quoting indictment)), and petitioner does not claim that these answers were correct, literally or otherwise. Indeed, petitioner's current claim that his testimony was literally true is directly contrary to his admission at trial that his testimony was false (see Pet. App. A11). Accordingly, petitioner's claim must fail.

b. The courts below correctly held that the grand jury questions were " 'sufficiently clear and precise to form the basis for the perjury charge' " (Pet. App. A12 (quoting district court's opinion)). Petitioner was initially questioned about whether he brought with him, as the subpoena commanded, all copies of the 1978 and 1979 tax returns (Pet. App. A3). Petitioner answered, "I have them" (*ibid.*). The ensuing questions clarified the fact that the copies petitioner had in his possession were either copies that he had made or copies that Agent Wamser had made from those copies and later returned to petitioner (*id.* at A4). Petitioner was then questioned about the copies of the 1978 and 1979 returns in the following manner (*id.* at A4-A5):

Q: So assuming that Mr. Wamser doesn't have the original or that Mr. Wamser gave you back what you gave him, then this is a copy that was made when you sent it in?

A: Yes.

Q: Of the original and when you prepared it and sent it in in January of '79?

A: Yes.

Q. And likewise on the '79 return, if this is a copy of what Mr. Wamser returned to you, then this is a copy that would have been made in January or the early part of 1980 when this return was sent in and, likewise, the '80 return would have been prepared and sent in the early part of 1981 and this is a copy of that document?

A: Yes.

Petitioner does not explain how he misunderstood these questions, which clearly asked whether he had made the copies when he had allegedly filed the returns. Indeed, petitioner admitted at trial that he was not confused by the

questions; his defense was that the false answers were the result of forgetfulness (Pet. App. A11). It is well settled that the defendant's understanding of the questions in a perjury case is a matter for the jury. See, *e.g.*, *United States* v. *Williams*, 552 F.2d 226, 229 (8th Cir. 1977); *United States* v. *Parr*, 516 F.2d 458, 470 (5th Cir. 1975). Here, the jury was properly instructed that petitioner should be acquitted if it found that he gave the false answers for some innocent reason, such as mistake or accident (2 Tr. 60). Further review of the jury's finding that petitioner understood the questions when he answered them is unwarranted.

c. Finally, petitioner contends (Pet. 12-14) that the government failed to prove that he made the copies of the tax returns between December 7, 1981, and February 27, 1982, as the indictment alleged. To be sure, James Davidson, the government's expert witness, testified that the copies were made between November 30, 1981, and February 27, 1982 (Pet. App. A10-A11); accordingly, there is a slight discrepancy between the dates alleged in the indictment and proven at trial. But that discrepancy is immaterial in this case. It is well settled that a minor discrepancy between the dates alleged in an indictment and the evidence adduced at trial is not fatal where, as here, no substantial rights of the defendant have been prejudiced. See, *e.g.*, *United States* v. *Ward*, 676 F.2d 94, 96 (4th Cir.), cert. denied, 459 U.S. 835 (1982); *United States* v. *Grapp*, 653 F.2d 189, 195 (5th Cir. 1981); *United States* v. *Powell*, 564 F.2d 256, 259 (8th Cir. 1977), cert. denied, 435 U.S. 904 (1978); *Russell* v. *United States*, 429 F.2d 237, 238 (5th Cir. 1970). In this case, it is immaterial whether the copies were made between November 30 and December 7 or after December 7 because the ultimate conclusion is the same: petitioner's testimony that he made the copies when the returns were allegedly filed in 1979 and 1980 was false, as petitioner himself admitted at trial (Pet. App. A11). Petitioner's objection is thus beside the point.

Petitioner also criticizes (Pet. 14) Davidson's failure precisely to identify the date when the copies of the tax returns that petitioner brought with him to the grand jury (GX 4) were made. However, Agent Wamser made those copies and sent them to petitioner after petitioner had asked the agent for them. The date of their creation was altogether irrelevant to any issue in the case because petitioner was alleged to have lied only about the dates of the copies that he had made himself (GX 1, 2). In any event, to the extent that the date that Agent Wamser copied the returns that were originally provided by petitioner was in any way germane, Agent Wamser testified that he made the copies on the same day that petitioner had asked for them, April 9, 1982 (1 Tr. 68).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Acting Solicitor General

JULY 1985

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No. 84-1833

In the Supreme Court of the United States

OCTOBER TERM, 1985

MICHAEL DRAPE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY TO THE MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT G. DUNCAN - 17044
(Counsel of Record)
2800-B Kendallwood Pkwy.
Gladstone, Missouri 64119
(816) 455-6555

MARY ANN DRAPE
Attorney at Law
1001 Bank of Kansas City Bldg.
Kansas City, Missouri 64105
(816) 221-6767
Attorneys for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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PETITIONER'S REPLY TO THE MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner respectfully submits this response to the Government's Memorandum in Opposition on the grounds that:

1. The Memorandum asserts erroneously that Petitioner did not raise the claim that his grand jury testimony was literally true and, at most, unresponsive before the trial court and court of appeals.

2. The Memorandum contains an inaccurate portrayal of Petitioner's trial testimony.

3. The Memorandum does not adequately identify the time of creation of Government Exhibit 4; first attempting to describe Exhibit 4 as a copy of Government Exhibit 2, then dismissing the date of creation as irrelevant to the issues in the case.

Petitioner respectfully submits that the Government's errors in the Memorandum are not substantiated by the record. Without burdening the Court with a re-argument of the issues, Petitioner feels compelled to clarify these statements.

1. The Government contends that Petitioner did not assert the claim that his grand jury testimony was literally true and at most, unresponsive before the lower courts.

A look at the trial record reveals that Petitioner filed motions to dismiss for failure to state an offence, to dismiss because questions before the grand jury were vague and subject to misunderstanding or misinterpretation and to dismiss because the questions before the grand jury were hypothetical. These motions were overruled on February 21, 1984, the first day of the trial. Nonetheless, the issues were raised in the Appellant's brief filed in the United States Court of Appeals for the Eighth Circuit on July 13, 1984.

Petitioner contends that the three motions constitute the essential elements of *Bronston v. United States,* 409 U.S. 352. Petitioner does not wish to re-argue the points he made in Question 1 of the Writ. It is apparent, however, that the claim that he spoke the literal truth in response to the examination before the grand jury is well established in the record.

2. Petitioner contends that the Government's portrayal of his trial testimony conveys the impression that he contradicted at trial his Grand Jury testimony concerning the copies of Federal Income tax returns that he brought with him.

Petitioner does not concede that his trial testimony in any way changed the testimony that he presented at the grand jury. The Government characterizes the trial testimony as a turn-around:

> "Petitioner admitted at trial that his testimony was false, and he added that he was not confused when he gave those false answers (Pet. App. A11). He claimed however, that he did not intend to give false testimony but simply forgot what he had done concerning the tax returns (ibid.)" (Gov't. Memo., p. 3)

As argued in the application for Writ, Petitioner contends that he spoke the literal truth in response to the questions before the grand jury. Petitioner pointed out in Question 1 that a careful reading of the questions contained in the Indictment elicited that Petitioner himself recognized that the copies he brought to the Grand Jury might have been ". . . a first retained copy or a copy made at some other time." (Pet. App. p. 8)

Consequently, the Government's claim that "Petitioner admitted at trial that his testimony before the grand jury was false, . . ." (ibid.) is unacceptable. There was no flat statement made before the grand jury that the copies Petitioner testified about were made at a particular time. Thus, there was no testimony for the Petitioner to contradict or deny at the trial.

It is further misleading to cite the hypothetical questions the Government isolates in its Memorandum, p. 5, as the false statements Petitioner made before the grand jury. As phrased—accepting the assumptions that the questioner builds in—the Petitioner has no choice but to answer affirmatively.

> Q. So assuming that Mr. Wamser doesn't have the original or that Mr. Wamser gave you back what you gave him, then this is a copy that was made when you sent it in?
>
> A. Yes.

Q. Of the original and when you prepared it and sent it in in January of '79?

A. Yes.

Q. And likewise on the '79 return, if this is a copy of what Mr. Wamser returned to you, then this is a copy that would have been made in January or the early part of 1980 when this return was sent in and, likewise, the '80 return would have been prepared and sent in the early part of 1981 and this is a copy of that document?

A. Yes. (Gov't. Memo., p. 5)

The affirmative answers do not establish that the copies were the first retained or some other copies. The Government itself can only say that the copies might be one or the other in introducing this exchange.

> "The ensuing questions clarified the fact that these copies the petitioner had in his possession were either copies he had made or copies that Agent Wamser had made from those copies and later returned to Petitioner (id. at A4)." (Gov't. Memo., p. 5)

Without establishing that the copies he testified about were actually made at the time alleged by the Government—between November 30, 1981, and February 27, 1982, the Petitioner has not testified falsely.

1. Because the alleged perjury involved Petitioner's testimony before the Grand Jury, it is imperative to keep in mind that Petitioner was testifying about Government Exhibit 4—the set of copies of 1978 and 1979 Federal Income Tax Returns that he brought to the Grand Jury as ordered by the subpoena served by Agent Wamser. The alleged perjury does not involve the two sets of copies delivered to Agent Wamser in December, 1981, and March,

1982, which are identified as Government Exhibits 1 and 2 respectively.

The Government attempts to link Exhibits 1, 2 and 4 by describing Exhibit 4 as a set of copies made on April 9, 1982, when "Agent Wamser copied the 'March set' (Gov't. Ex. 2) of the returns and sent the copies that he had made to the Petitioner." (Gov't. Memo., p. 2) The record does not substantiate this assertion.

At every opportunity, Petitioner has pointed out that Exhibit 4, the set of copies brought to the Grand Jury, differed from the two sets of copies given previously to Agent Wamser. There is no proof that Exhibit 4 was the copies made on April 9, 1982, though, as the Government cites in its Memorandum (p. 7), Agent Wamser testified that on July 9, 1982, he ". . . inspected them and they *appeared* to be the same copies that I provided to him earlier on April 9, 1982." (Tr. Vol. 1, p. 69, emphasis added) Yet, in the very next question, Agent Wamser states that Petitioner himself recognized that there was some question as to what set of copies he was providing the Agent.

> Q. Mr. Mariens. What, if anything else, did the defendant concerning the '78 and '79 returns, sir, concerning the original documents themselves, the retained copies?
>
> A. Mr. Wamser. I asked him if the copies that he was providing me were the first retained copies, which he stated that he believed they were, and if they weren't they were the copies that I had provided him in April, 1982. (Tr. Vol. 1, p. 69)

Furthermore, Petitioner made the same statement, when he testified *under oath* before the Grand Jury on July 14, 1982. (Pet. App. Appendix A4, Indictment, p. 3)

Is there any evidence at all to substantiate the Government assertion that Exhibit 4, the copies brought to the Grand Jury and testified under oath by the Petitioner, were copies of Exhibit 2 made by Agent Wamser on April 9, 1982?

No.

The Government's own expert witness cannot establish a link. When questioned about Exhibit 4, Document examiner James Davidson states that Exhibit 4 ". . . are not copies that were made on the same machine that produced Government's Exhibits 1 (a) through (h) or 2 (a) through (h)." (Tr. Vol. 1, p. 154) Mr. Davidson does not offer any testimony concerning when the copies were made or on what machine.

Certainly Mr. Davidson testifies that Government Exhibits 1 and 2, the copies given previously to Agent Wamser were made between December 7, 1981, and February 27, 1982. The failure to identify Government Exhibit 4 as made during the same period seriously questions the sufficiency of evidence to sustain Petitioner's conviction.

Petitioner believes he established this failure in Question 3 of his Petition for Writ (p. 12, 13, 14) and will not repeat his argument. However Petitioner wishes to correct the Government's assertion, in their attack on Question 3, that the "dates of creation" of Government Exhibit 4 ". . . was altogether irrelevant to any issue in the case because petitioner was alleged to have lied only about the dates of the copies that he had made himself (GX 1, 2)."

Not only does this claim flatly contradict the chain of evidence that the Government has sought to establish

against the Petitioner, it contradicts the charge of the Indictment. The Indictment states specifically the alleged false testimony concerned the copies of ". . . 1978 and 1979 Federal Income Tax Returns that he had provided to an Agent of Internal Revenue Service *and then brought to the Grand Jury. . .*" (Emphasis added, Pet. App., p. A6, A7).

Petitioner respectfully submits that the Government not be allowed to first attempt to link Exhibit 4 to Exhibits 1 and 2; and then contend that the date of creation they attempt to establish is "irrelevant."

CONCLUSION

We, therefore, urge that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

ROBERT G. DUNCAN - 17044
(Counsel of Record)
2800-B Kendallwood Pkwy.
Gladstone, Missouri 64119

MARY ANN DRAPE
Attorney at Law
1001 Bank of Kansas City Bldg.
Kansas City, Missouri 64105
Attorneys for Petitioner